No. 10931

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM JENNINGS BRYAN, JR., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection, District No. 27,

*Appellant.*

*vs.*

UNION OIL COMPANY OF CALIFORNIA, a corporation,

*Appellee.*

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**Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.**

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## APPELLANT'S REPLY BRIEF.

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### The Contentions of the Parties.

In the light of appellee's brief it appears that the basic question presented on this appeal is whether, after making an unprotested payment of the tonnage tax at the rate demanded by the collector and exhausting its administrative appeal to the Director, appellee, through the expedient of attempting to proceed against the collector individually in a common law action brought on analogy to *De Lima v. Bidwell*, 182 U. S. 1, 176 (1902), may escape the binding effect given the Director's decision by the Act of 1884.

Since the amount involved is only $204.28 and there is no diversity of citizenship, appellee's only remedy in the

federal courts would be by suit against the United States under the Tucker Act unless this action may be maintained against the collector individually under section 24(5) of the Judicial Code (28 U. S. C. 41(5)). It is common ground to appellant and appellee that section 25(5) does grant the district court jurisdiction of all cases arising in connection with revenue from tonnage and it has accordingly never been disputed that the district court properly took jurisdiction of this action. It is equally common ground that within the narrow limits of the rule in *De Lima v. Bidwell, supra;* cf. *United States v. Lee,* 106 U. S. 196 (1882), a collector may in certain circumstances be held individually liable in a common law action (Opening Br. 16-17; Appellee's Br. 4). Appellant denies, however, the contention of appellee that the facts of this case bring it within the ambit of the rule in *De Lima's* case. Appellant further denies appellee's contention that the courts have jurisdiction to examine *de novo* the decisions of the Director in suits under section 24(5) of the Judicial Code. Appellant submits that whether in a suit under the Tucker Act or in a suit against the collector individually under section 24(5), the plain language of section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3), makes the Director's decisions final. Secondarily, appellant submits that in any event the Director's decision correctly applies the tonnage statute to the case at bar.

## ARGUMENT.

### I.

### An Action Against the Collector Individually Will Not Lie in the Circumstances of This Case.

Since the $204.28 involved was paid to the collector without protest and by him paid over to the Treasury as required by 19 U. S. C. 1512, it appears to be conceded that appellee must proceed by suit against United States under the Tucker Act unless the defendant collector exceeded his jurisdiction or was guilty of a personal wrong in receiving the payment. Appellant submits that neither situation is presented here and that appellee, although claiming that it brings this action under the rule in *De Lima v. Bidwell*, has not even attempted to bring this case within the facts of that case and the other cases upon which it relies (Br. 4-7).

In *DeLima v. Bidwell* the question presented for decision was whether, after the cession of Puerto Rico to the United States, sugars brought into the port of New York from that island were dutiable under the tariff acts as imports. The plaintiff paid the duties to the collector under protest and, without attempting to appeal to the Board of General Appraisers, brought suit against the collector individually. The Customs Administration Act, 1890, had provided that collectors should not be liable for "the collection of any dues, charges or duties on or on account of any such merchandise" or for any other matter which the importer might bring before the Board of General Appraisers. The Government argued that the statute thereby prohibited all actions against the collector individually. The Supreme Court Court, however, referred to *In re*

*Fassett,* 142 U. S. 479 (1892), and stated (182 U. S. at 176):

> "We think the decision in the *Fassett* case is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers; and that whether they were imported merchandise for the reasons given in the *Fassett* case, that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case the article is not *imported.*"

It discussed the provisions of the Customs Administration Act and concluded (182 U. S. at 177):

> "If the position of the Government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestice port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position."

Turning to the cases holding that, where there was jurisdiction to impose duties and the controversy was only as to the rate and amount, suit would not lie against the collector, the Court examined them and continued (182 U. S. at 179):

> "The criticism to be made upon the applicability of these cases is, that they dealt only with *imported merchandise* and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment or

> any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification."

It is at once plain that the present case does not in any respect resemble the *De Lima* case. The case at bar was not one where the collector exceeded his jurisdiction by demanding duties where none were due. The *Montebello* did not come from another port of the United States and so fall outside the tonnage tax statute and the jurisdiction of the Director under section 3 to interpret it. The controversy is solely as to the classification of the voyage and the rate of duties to be collected and accordingly falls squarely within the authority of the Director. Far from supporting appellee, the *De Lima* case is authority for appellant. But appellee urges (Br. 4, 7) that decisions in customs cases cannot be authority for tonnage tax cases because the statutes are not the same. It is submitted that where, as here, the statutes contain similar provisions inserted for similar purposes arising out of analogous situations, cases construing the effect of such statutes in customs matters provide the best possible guide in deciding the controversy.[1]

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[1]Since the foundation of the Government there appeared to have been only three reported cases involving suits against the collector to recover tonnage taxes: *Ripley v. Gelston*, 9 Johns, 201 (1812, N. Y. Sup. Ct.); *North German Lloyd S.S. Co. v. Hedden*, 43 Fed. 17 (1890, C. C. N. J.); *Laidlaw v. Abraham*, 43 Fed. 297 (1890, C. C. Ore.).

Cases like *De Lima v. Bidwell* and the others cited by appellee turn on the circumstances that since the action of the collector exceeded his jurisdiction he could make no claim to have acted officially. His acts were therefore deemed to constitute an individual wrong for which he was individually liable. Thus in *Ogden v. Maxwell,* 18 Fed. Cas. No. 10,458 (1855, C. C. N. Y.), the controversy was not as to the classification or rate but as to the jurisdiction to collect at all. The statute authorized the collection of a fee of 20 cents for a permit to land baggage from vessels. The collector exceeded his jurisdiction by collecting a 20-cent fee for each five passengers landed although issuing only one permit for each vessel. In *Border Line Transportation Co. v. Haas,* 128 F. (2d) 192 (1942, C. C. A. 9), the controversy was exclusively as to the jurisdiction of the collector to collect any fee under the statute, not as to the rate or amount collectible. So again in *Consulich Line v. Elting,* 40 F. (2d) 220 (1930, C. C. A. 2), the controversy was as to the jurisdiction under the statute to impose multiple fines and not as to the classification and rate to be used in computing the amount of fines admittedly due.

Moreover, as already pointed out (Opening Br. 18), some notice or protest is necessary to hold the collector individually while it appears from the stipulation of facts that appellee's payment of the tonnage taxes was made voluntarily and without protest with the intention of taking its administrative appeal to the Director. Appellee (Br. 6-7) and the court below [Opinion, R. 55] suggest that the payment to the collector was under duress and compulsion and that therefore protest was not needed. They argue that the filing of the Master's oath on entry showing the voyage to be from Talara via Vancouver was

under compulsion in that had the Master refused the vessel might have been subjected to forfeiture. They imply that the payment in accordance with the oath was itself therefore under duress and dispensed with the necessity of protest.[2] It is submitted that this contention is devoid of merit. It does not appear that any penalty whatever is imposed for the filing in good faith of an oath containing a conclusion of fact as to the character of the voyage which is later determined to be erroneous. Even failure to enter a vessel at all entails no liability of the vessel to forfeiture but only subjects the Master to liability to a fine (19 U. S. C. 1436). Since it involves a matter of judgment the oath is not perjured. But if it could be assumed that the filing of the oath was under compulsion, still it would not follow that payment of the tax was in consequence of duress. As previously indicated (Opening Br. 37) the procedure for compelling payment of tonnage

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[2]Appellee's assertion, that where payment is under compulsion protest is unnecessary, is not supported by the decided cases. Appellee's chief reliance is the dictum of the Supreme Court in *Elliott v. Swartout*, 10 Pet. 137, 158 (1836), respecting *Ripley v. Gelston*. But earlier in its opinion the Supreme Court had already observed (p. 157): "The case of *Ripley v. Gelston*, 9 Johns. 201, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The *plaintiff objected to the payment*, as being illegal, but paid it, for the purpose of obtaining the clearance, and the money had been paid by the collector into the branch bank, to the credit of the treasurer. The defense was put on the ground that the money had been paid over, but this was held insufficient." (Italics supplied.) *Ogden v. Maxwell*, 18 Fed. Cas. No. 10,458 (1855, C. C. N. Y.), appellee's only other authority, involved the absence of a formal written protest as required by the Act of 1845 in some cases. It appears there had been some sort of notice or protest although not in writing. In the present case of the *Montebello* there was no notice or objection whatsoever.

tax is by denying clearance to the vessel. *E.g., Ripley v. Gelston,* 9 Johns 201, (1812, N. Y. Sup. Ct.). Where the vessel does not seek to clear, the Government libels her for the amount of the tax. *E.g., The Alta,* 148 Fed. 663 (1906, C. C. A. 9.) Liability to such an action does not constitute duress for the owner has every opportunity in the litigation to assert any defenses to payment.

The stipulation of facts [R. 41] and the court's findings [R. 63] show plainly that payment was not made under any form of compulsion whatever. The law is firmly settled that "unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary." *Cunard S. S. Co. v. Elting,* 97 F. (2d) 373, 377 (1938, C. C. A. 2). In the case at bar as in *United States v. Cuba Mail S. S. Co.,* 200 U. S. 488, 494 (1906), "There was no claim to the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of law and yielding only to enable his ships to depart to their destination." On the contrary it is obvious that payment was made voluntarily with the intention of perfecting administrative appeal to the Director for refund in accordance with the regulations. Appellant submits that appellee thereby recognized the collector for the mere ministerial officer which he is in fact and left him no alternative but to accept appellee's payment and forward it to his superior, the Director, with the papers relating to appellee's administrative appeal. In such circumstances it would be contrary to equity and good conscience to hold the defendant collector individually liable at common law if on judicial review the decision of his superior, the Director, is found to have been arbitrary or capricious.

## II.

## The District Court Has Jurisdiction of an Action Against the Collector But Has No Jurisdiction in Such an Action to Examine De Novo the Director's Decisions.

Appellee contends (Br. 17-19), that not only does section 24(5) of the Judicial Code (23 U. S. C. 41 (5)) confer jurisdiction of the action against the collector individually but by necessary implication also restricts *pro tanto* the effect of section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3), and authorizes the district court to examine *de novo* the decisions of the Director and substitute its own findings and interpretation despite the finality accorded the administrative decisions by the express language of that act. Appellee's argument proceeds by confusing the question of the court's jurisdiction of the action under section 24(5) with that of the limitations placed by the Act of 1884 upon the court's authority to exercise that jurisdiction to review decisions of the Director. Appellee seeks to conclude from the fact that the Government has never in this or in earlier similar proceedings denied the court's jurisdiction of the action that until now it has conceded the court's right to review the Director's decisions in an action under section 24(5). Thus appellee insists (Br. 9) with respect to *North German Lloyd S. S. Co. v. Hedden,* 43 Fed. 17 (1890, C. C. N. J.), that, "The court raised the question of jurisdiction, *sua sponte*, the court remarking as to defendant's counsel's failure to even brief the question of jurisdiction." And similarly argues (Br. 19) that if the Act of 1884 had been intended to restrict judicial review Congress would have found it "a simple matter to provide that the courts were not to have jurisdiction."

It is submitted that the distinction between the two questions confused by appellee is elementary; that while absence of authority to review an administrative decision is often characterized as a lack of jurisdiction it need not be so regarded and that the jurisdiction of actions involving tonnage conferred by section 24(5) has no more effect upon the restriction on the court's authority by section 3 of the Act of 1884 than has the jurisdiction of suits against the United States conferred by the Tucker Act. There is nothing inconsistent in the course followed by the Government. As pointed out by appellant (Opening Br. 11, 30-32), the court in the *North German Lloyd* case expressly referred to the Government's position that the Supreme Court case of *Cary v. Curtis*, 3 How. 236 (1845), had established the validity of statutes making administrative decisions final and binding on the courts and that it was accordingly unnecessary to brief the question although the shipping companies were vigorously urging that the statute was invalid. In such circumstances it is at least disingenuous for appellee to attempt to imply that the court's consideration of the effect of the Act of 1884 was *sua sponte*. Never from the beginning has the Government acquiesced in appellee's apparent view that the courts may ignore the statutory provision for administrative finality and substitute their own interpretation for the Director's decisions. The Government's practice of not treating the matter as a jurisdictional defect is understandable. As a restriction on the manner in which jurisdiction may be exercised it need not be so regarded. The situation is no different than that where parties to a private contract stipulate that the decisions of an arbitrator shall be final. Whatever confusion may have existed at one time, it is now settled that such arbitration clauses do not oust the court of jurisdiction but, on the contrary, merely limit the

scope of the court's examination of the case and are valid and binding upon the courts and parties alike.

There is no greater merit in appellee's suggestion that Congress might, as it has in recent tax and veterans' legislation, expressly deny the courts all jurisdiction of such cases. In arbitration and dispute clauses of private contracts, where the parties lack the power thus to deny jurisdiction to the courts, no such formula of words has ever been found necessary. This style of legislative draftsmanship is of recent origin and we know of no principle which requires the draftsmen of 1884 to anticipate the linquistic preferences of a half century later. The plain, express language of section 3 of the Act of 1884 makes the decisions of the Director final and Congress, no more than the parties to private agreements for arbitration, had any need to say more. There is no provision anywhere allowing an appeal from the final decision of the Director to the courts. *Cf. Cruchfield v. United States*, 142 F. (2d) 170, 173 (1943, C. C. A. 9).

Nor is it any argument to say, as appellee implies (Br. 15), that should the Director fall into error the taxpayer will have been denied a legal remedy. A legal remedy need not be a judicial remedy (Opening Br. 32) and for the purpose of appeal from the action of the collector, section 3 of the Act of 1884 makes the Director the competent legal tribunal. If the courts were authorized to review his decision and the highest appellate court should commit error, there would equally be no legal remedy in appellee's sense. But the object of such statutory provisions and of similar clauses in the contracts of private parties is to confine the decision of technical questions to persons possessing special skill and experience in order to limit the field of controversy and the expense of litigation. The purpose is to relieve judges,

who are specialists skilled in legal matters, of endless technical details of tonnage admeasurement and the assessment of tonnage taxation as to which they are not skilled. While the present controversy over $200 may seem technical, if the learned district judge is correct in his interpretation of the Act of 1884, the courts may be equally required to review and determine the much more technical question of the correct tonnage admeasurement of any ship or motorboat. The same provision of the Act of 1884 is applicable and the same result must be reached.

Long before section 3 of the Act of 1884, Congress had adopted the practice of leaving such technical questions to final decision by the skilled administrative officers involved. Provisions similar to that of section 3 are not unique. Besides the Act of 1839 and R. S. 2930 referred to in appellant's opening brief, an instance, also familiar to the draftsmen of 1884, where language of even more general character was held to restrict judicial review is furnished by R. S. 3264, providing for distillery surveys for tax purposes. That section, since repealed, directed collectors of internal revenue or their deputies to make surveys of distillery plants and fix their production capacity. The capacity thus determined was the basis for computing the tax liability of the distiller and was conclusive except for review by appeal to the Commissioner of Internal Revenue. *Collector v. Beggs*, 17 Wall. 182, 191 (1872); *Pahlman v. Collector*, 20 Wall. 189, 197, 201 (1873). The question at bar differs in no important particular from that of the distillery survey. The voyage as determined by the Director furnishes the basis for computing the vessel's tax liability exactly as the capacity determined by the Commissioner furnished the basis for computing that of the distillery.

## III.

## The Director's Decision in the Case of the Montebello Was Not Capricious or Inconsistent and Was Conclusive on the Court.

Far from being capricious and arbitrary the Director's decision in the case of the *Montebello* is based upon the only workable application of the tonnage statute in the situation which appellee concedes to exist. As appellee observes (Br. 24), in regard to a tanker trading as did the *Montebello,* "The tanker keeps going in a circle of the oil ports until repairs force a lay-off." And (Br. 21), "There seems no more logical reason to assume that the voyage started at Talara, than at any of the points in Chili, or even Los Angeles." It does not follow, however, as appellee contends (Br. 23-24), that there is no such thing for the vessel as a voyage out and home in the sense contemplated by the Congress in the tonnage tax statute, or that the last previous port of discharge is the only port from which a vessel may be deemed to enter. On the contrary, it is submitted that, since the whole voyage is circular, when the vessel enters an American port she enters not alone from her last port of call but from every port in the circle of her voyage.[3] Some of these ports may be American and as to them no tax is due. Some may be foreign North or Central American ports within the short-voyage limits and as such taxable

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[3]This principle is recognized in 19 U. S. C. 1434, relating to the entry of vessels where it is provided that "the master of a vessel of the United States arriving in the United States from a foreign port or place shall * * * make formal entry of the vessel at the customhouse by producing and depositing with the collector the vessel's crew list, its register, or document in lieu thereof, the clearance and bills of health issued to the vessel at the foreign *port or ports from which it arrived,* together with the original and one copy of the manifest." (Italics supplied.)

at the 2-cent rate. Some may be foreign ports in the long-voyage limits and taxable at the 6-cent rate. In every case it is necessary to consider the port of origin of the entire voyage and the port of its ultimate destination as well as every other port of call and the vessel should pay a single tax calculated at the highest rate applicable to any of the ports with which she has traded on her voyage. As was pointed out to the Congress in 1887 (see Opening Br. 50), this principle of the highest single rate is the inevitable consequence of the statutory scheme and has now been sanctioned by the tacit approval of Congress for over fifty years.

Appellee's argument (Br. 24) that the decisions in the *Ontariolite* and *Rotterdam* cases are inconsistent with the Director's decision in the *Montebello* case and show it to be arbitrary and capricious is purely meritricious.[4] They are in complete accord with the principle just stated. The voyages in those cases were not circular, like that of the *Montebello* here. They were simply out and back. Thus the *Ontariolite*, a British vessel, entered Port San Luis in ballast from Vancouver; loaded a cargo and returned to the port of Ioco at the same place. The Director correctly held (R. 24-26) that this constituted an independent voyage from Vancouver to Port San Luis for cargo and return, did not form part of the previous voyage to South American ports and back, and was

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[4]The case of the *Santa Maria*, referred to by appellee (Br. 25; cf. Fdg. XXIII, R. 66) as identical with that of the *Montebello*, is without significance here. It was never decided by the Director under 46 U. S. C. 3 since the collector accepted the lower rate and no provision is made to submit for review by the Director the cases which are favorable to the taxpayer. (See Opening Br. 37, note 28). It is accordingly no evidence of the administrative interpretation of the Director whose interpretation is alone made binding by the statute.

accordingly taxable at the 2-cent rate. Similarly in the *Rotterdam* the voyage plainly was not circular but was a tramping operation from port to port, first one way, then another. The vessel, a Dutch tanker, had proceeded to Talara where she took cargo and after transiting the Panama Canal discharged at various Central American ports on the Atlantic side. She then cleared Cutuco, El Salvador, for Bowling, Scotland, via San Pedro and again transited the canal to the Pacific. She entered at San Pedro in ballast, took her cargo for Bowling and returned through the canal to the Atlantic. The case did not reach the Director but was decided by H. C. Shepheard, Acting Director, who held [R. 27-29] that in the circumstances her trip from the Caribbean to the Pacific to take cargo at San Pedro and back to the Caribbean and on to Scotland was an independent voyage, "the port of origin of which was Cutuco and the port of ultimate destination of which was Bowling via your port [of San Pedro]." The case is a close one which might have been decided the other way but, like the *Ontariolite*, it is an entry from what was essentially an independent voyage out and back and is perfectly consistent with the decision in the *Montebello* case.[5] If the *Montebello* had

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[5]Since the Acting Director's decision was in favor of the taxpayer the case did not reach the Director for rehearing and we do not know whether he would have affirmed the decision of his subordinate or reinstated the action of the collector. The case indicates the complexities of the question of whether a vessel enters from a voyage trading in the long-voyage limits or only within the short-voyage limits. It illustrates the burden upon the time of the courts and the increased expense to the shipping interests and to the Government alike which would result if decision of technical questions involving insignificant amounts had been committed to the courts rather than to administrative experts.

come from Vancouver to Port San Luis to take cargo and return to Vancouver, it also would have been taxable at the 2-cent rate. Instead, however, Port San Luis marked the end of its voyage after which it changed its document from register for the foreign trade to license and enrollment for the untaxed coasting trade.

Appellee (Br. 23-24), echoing the court below [R. 54-55], attempts to escape the difficulty in the determination of the applicable rate by interpreting the statute as meaning that, regardless of whether the vessel is in fact trading in the long-voyage limits, she is to be deemed as entering only from whatever port she last cleared. The appealing simplicity of this construction must be recognized, but it flies in the face of the rule that even what appears to be a literal interpretation of a statute is not permissible where it leads to a result which Congress could not have intended. *Cf. United States v. 21 pounds of Platinum*, 147 F. (2d) 78, 83 (1945, C. C. A. 4). The legislative history of the tonnage statute (see Opening Br. 46-50) shows plainly the intention of Congress to make the rate of tonnage tax vary with the character of the voyage: Vessels trading in the short-voyage limits are to pay but two cents while those trading beyond pay six. Simplicity of administration is no reason for adopting the inequitable course of exempting from the 6-cent rate a vessel on a circular voyage extending into the long-voyage limits while imposing it on the vessel which trades directly with a long-voyage port.

## Conclusion.

It is therefore submitted that in the circumstances no action will lie against the collector individually, that the decision of the Director is final and conclusive on the courts, and that in any event the tonnage tax was correctly assessed at the 6-cent rate. Accordingly appellant respectfully submits that the case should be remanded to the district court with instructions to dismiss appellee's complaint.

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